BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK A. SCHULTZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 211,499
JOE CONROY CONTRACTOR, INC.	)	
Respondent	)	
AND	)	
	)	
KANSAS BUILDING INDUSTRY WCF	)	
Insurance Carrier	)	

ORDER

Respondent appealed the September 16, 1999 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on January 5, 2000.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared on behalf of claimant. Matthew S. Crowley of Topeka, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an August 14, 1995 accident and the alleged resulting injury to claimant's low back. After finding that claimant's wage loss was 19 percent and his task loss was 48 percent, Judge Avery awarded claimant a 33.5 percent work disability through April 30, 1998. Thereafter, beginning May 1, 1998, the award was reduced to the percentage of functional impairment which the ALJ found to be 8.5 percent. This reduction in disability coincided with claimant's graduation from college. This is the date the ALJ found claimant became capable of earning a wage of 90 percent or more of the wage claimant was earning before his injury.

Respondent and its insurance carrier contend that claimant sustained no functional impairment as a result of the August 1995 accident as he had low back symptoms and

erectile dysfunction before that accident. Respondent also disputes claimant's entitlement to an award of future medical and contends that the ALJ improperly calculated the award.

Conversely, claimant contends Judge Avery erred by reducing Dr. Zimmerman's impairment rating by the 10 percent that was for erectile disfunction and also erred by averaging Dr. Zimmerman's remaining 11 percent rating with Dr. Baker's opinion that claimant now has a 6 percent whole body functional impairment after reducing his impairment rating by the percentage of impairment Dr. Baker determined was preexisting. Claimant argues that Dr. Baker's opinion that claimant had a preexisting impairment does not conform with the Third Edition, Revised, of the AMA Guides to the Evaluation of Permanent Impairment. Claimant also disputes the ALJ's determination of claimant's average weekly wage.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) Claimant worked for respondent as a concrete finisher. On August 14, 1995, claimant injured his low back when he and four other employees were lifting and carrying one of respondent's riding trowel machines. At the time of the incident, claimant experienced a sharp pain in his low back and pain down the back of his leg. The parties stipulated that claimant's accident arose out of and in the course of his employment with respondent.

(2) Claimant initially received medical treatment from Med Assist. Med Assist then referred claimant to Dr. Brett E. Wallace for further treatment. Claimant also sought treatment on his own from a chiropractor, Dr. Zoller, who claimant had also seen before this injury. Claimant was also seen by Dr. John D. Ebeling, but he provided no treatment. At his attorney's request, claimant saw Dr. Daniel D. Zimmerman to be evaluated for purposes of this workers compensation claim. He was also evaluated by Dr. Phillip Baker at the request of respondent's attorney.

(3) Dr. Wallace ordered an MRI which claimant understood revealed a herniated disc. However, surgery was never recommended. Claimant was released with a 75 pound lifting restriction. Claimant did not return to work for respondent. Instead, he pursued a college education which had been claimant's plan even before this injury. Respondent subsequently acknowledged that it did not have work available within the 75-pound lifting restriction recommended by Dr. Wallace. While in college, claimant has worked various part time and summer jobs including work as a framing carpenter that paid $11.00 per hour. If claimant had worked full time as a carpenter, he could have earned a wage comparable to that which he was earning with respondent.

(4) In May of 1998 claimant graduated from Washburn University with a bachelor's degree in biology and minors in chemistry and physics. Thereafter, claimant applied to and

was accepted to law school. He is attending Washburn University School of Law and will graduate in 2001.

(5) Claimant was examined on February 2, 1998, by board certified orthopedic surgeon, Phillip L. Baker, M.D. Dr. Baker diagnosed claimant with degenerative disc disease of the lower lumbar spine and spondylolisthesis at the L5-S1 level. He rated claimant's impairment of function as 19 percent under the Third Edition, Revised, of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Baker opined that a portion of claimant's condition preexisted the accident. Dr. Baker's rating did not include a percentage for erectile dysfunction. In Dr. Baker's opinion, erectile dysfunction would not be consistent with the diagnosis he made and would not be related to the work related accident.

(6) Dr. Zimmerman examined claimant on August 12, 1998. He also rated claimant as having a 19 percent impairment under the Third Edition, Revised, of the AMA Guides, however this rating included 10 percent for sexual dysfunction. The remaining 11 percent was for the spondylolisthesis and radicular weakness affecting the left lower extremity. Dr. Zimmerman recommended lifting restrictions of 20 pounds occasionally, 10 pounds frequently, and to avoid frequent flexing of the lumbosacral spine, avoid frequent bending, stooping, squatting, crawling and kneeling activities. Dr. Zimmerman did not attribute any portion of his rating to claimant's preexisting condition because the AMA Guides require a minimum of six months of medically documented pain and rigidity which claimant did not have.

(7) Although claimant testified his symptoms relating to erectile dysfunction began after the August 1995 accident, claimant's ex-wife testified to her personal knowledge that claimant has had this problem since at least before they were married on April 9, 1993. Claimant told her that this problem began following an injury he suffered while in high school.

(8) Claimant has demonstrated an ability to work beyond the restrictions recommended by Dr. Zimmerman. Also, claimant exceeds those limitations as a part of his personal fitness program which includes lifting weights. The Appeals Board finds the claimant's true restrictions lie somewhere between those recommended by Dr. Zimmerman and the 75 pound restriction imposed by Dr. Wallace. Similarly, the Appeals Board finds claimant's functional impairment lies somewhere between the 11 percent given by Dr. Zimmerman and the 19 percent by Dr. Baker. Both are credible opinions and the Board will average these two ratings to find claimant's impairment is 15 percent.

(9) Respondent paid claimant $11.75 per hour. Weather permitting, he was expected to work at least 40 hours per week. His weekly straight time, therefore, calculates to $470.00 per week.[1] Claimant also established that he earned a total of $507.57 in

[1] K.S.A. 44-511(a)(5) and K.S.A. 44-511(b)(4)(B)(ii).

overtime during the 26 weeks that preceded his date of accident. This results in an average weekly overtime of $19.52.[2] Although the wage statement[3] shows a larger amount was paid above the weekly straight time calculation, the testimony of respondent's payroll manager, Tracy Kern, established that certain of these payments were for straight time pay that had not been reported or submitted in time to be paid with the weekly earnings for the week in which they were earned. $507.57 represents the total of the amounts the record establishes were clearly overtime earnings. Finally, respondent contributed $90.84 to a profit sharing plan for claimant during the 26 week period before the accident. This amounts to $3.49 in average weekly compensation, for a gross average weekly wage of $493.01.[4]

CONCLUSIONS OF LAW

(1) The Award should be modified to grant claimant a 15 percent permanent partial general disability.

(2) Because a back injury is an "unscheduled" injury, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

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[2] K.S.A. 44-511(b)(4)(B)(iii).

[3] Kern Deposition Exhibit 5.

[4] K.S.A. 44-511(a)(2) and K.S.A. 44-511(b)(4)(B)(iv).

The above statute must also be read in light of Foulk[5] and Copeland.[6] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(3) While in school, claimant demonstrated an ability to earn a comparable hourly wage during his summer and part-time employment as a carpenter. Furthermore, he had the ability to do this work full time. Claimant's decision to return to school and obtain a college degree had nothing to do with his injury or his resulting work restrictions. The Appeals Board finds that claimant has not made a good faith effort to find appropriate employment.

(4) As provided by the Workers Compensation Act, a worker may only recover an award for increased impairment or disability.[7] The Act provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Although claimant had back complaints before his August 1995 accident, the record does not establish that he had a preexisting functional impairment.

(5) As indicated above, claimant has the ability to earn a comparable wage, but for personal reasons chose not to do so. Therefore, claimant's permanent partial general disability is limited to the functional impairment rating.

(6) The Appeals Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board modifies the September 16, 1999 Award to deny work disability and increases the permanent partial general disability award based on functional impairment to 15%.

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[5] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] K.S.A. 44-501(c).

Claimant is granted compensation from respondent and its insurance carrier for an August 14, 1995 accident and resulting disability. Based upon an average weekly wage of $493.01, claimant is entitled to receive 3 weeks of temporary total disability compensation at the rate of $326.00, totaling $978.00, followed by 62.25 weeks of permanent partial general disability benefits at $326.00 per week, or $20,293.50, for a 15% permanent partial general disability, making a total award of $21,764.51, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts all orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Matthew S. Crowley, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director